

¹ 5 U.S.C. § 8101 *et seq.*

OWCP accepted that on or before November 1, 1994 appellant, then a 51-year-old aircraft mechanic, sustained an aggravation of degenerative arthritis of both thumbs, the left wrist, and both knees due to repetitive motion and strenuous activities in the performance of duty. Appellant stopped work in early 1998 and did not return. He received compensation for total disability beginning on December 2, 1998. Appellant underwent a partial meniscectomy of the right knee on March 17, 1999 and a total right knee arthroplasty on November 6, 2010. OWCP approved the procedures.

Pursuant to the prior appeal, on October 13, 2011, the employing establishment had offered appellant a full-time position as an aircraft mechanic helper. Appellant refused the position contending that walking on uneven surfaces, kneeling, and crouching, as required by the offered position, exceeded his activity limitations following bilateral knee arthroplasties. Following additional development, by decision dated August 23, 2012, OWCP terminated appellant's wage-loss compensation benefits effective August 26, 2012 under 5 U.S.C. § 8106(c) because he refused an offer of suitable work. The Board's April 22, 2013 decision and order reversed OWCP's August 23, 2012 determination finding that the offered aircraft mechanic helper position exceeded appellant's medical restrictions.²

Following the Board's April 22, 2013 decision and order, OWCP reinstated appellant's wage-loss compensation benefits retroactive to August 26, 2012. Appellant remained off work.³

In an October 31, 2012 report, Dr. Thomas E. Bates, an attending Board-certified orthopedic surgeon, noted that appellant had intermittent pain after total left knee arthroplasty in November 2009 and total right knee arthroplasty in November 2010. The pain did not limit his activities. Appellant was not compliant with recommended quadriceps strengthening exercises. Dr. Bates obtained bilateral knee x-rays showing well-aligned components without loosening. He opined that appellant was doing well.

On June 6, 2013 OWCP obtained a second opinion from Dr. Robert M. Moore, a Board-certified orthopedic surgeon, who reviewed the medical record and a statement of accepted facts. Dr. Moore noted appellant's complaints of bilateral hand, wrist, and knee pain. On examination he found prominence and tenderness of the carpometacarpal joint of both thumbs, restricted motion of both wrists, and slightly restricted motion of both knees without instability. Dr. Moore obtained x-rays of both hands and wrists showing marked degenerative arthritis with osteophyte formation in the trapeziometacarpal and capitolunate joints of both thumbs, degenerative arthritis with joint space narrowing and osteophyte formation in both wrists, and stable prostheses of both knees. He diagnosed advanced carpometacarpal osteoarthritis of both thumbs, scapholunate collapse with osteoarthritis of both wrists, and status post bilateral knee arthroplasties. Dr. Moore noted the accepted conditions as they were listed on the statement of accepted facts. He found appellant unable to work as an aircraft mechanic helper because he could not lift 40 pounds, climb, kneel, or stoop. Dr. Moore opined that appellant could perform full-time sedentary work. He noted permanent work restrictions limiting lifting, pulling, and

² Docket No. 12-1868 (issued April 22, 2013).

³ Appellant had stopped work on July 30, 1998.

pushing to 10 pounds for no more than three hours a day, walking and standing to three hours a day, and no bending or stooping.

Based on Dr. Moore's opinion, OWCP expanded the claim to include bilateral thumb osteoarthritis, bilateral wrist osteoarthritis, bilateral knee osteoarthritis, and bilateral total knee arthroplasties.

On June 25, 2013 OWCP referred appellant for vocational rehabilitation. A vocational rehabilitation counselor noted that, in addition to the accepted conditions, appellant had cardiovascular problems and had sustained a stroke. He recommended pursuing sedentary employment at the employing establishment. Appellant participated in vocational testing.

On November 5, 2013 the employing establishment offered appellant a position as an equipment cleaner, with modifications for his medical limitations. The duties involved cleaning, degreasing, and stripping aircraft components, dipping parts into solvent tanks, using hand and power brushes, spray guns, and steam cleaning equipment. Appellant would be required to wear protective clothing and footwear due to anticipated fluid spills on floors and surfaces.

Appellant declined the position on November 18, 2013, asserting that using the power tools and nonpower equipment described in the job offer exceeded his medical restrictions. Also, a blocked artery behind his right knee precluded him from prolonged standing and walking. Appellant contended that slippery floors were an unacceptable fall hazard.

In a November 20, 2013 memorandum, the employing establishment stated that appellant would not be required to use power or hand tools, or to work in areas with wet floors.

In a November 22, 2013 investigative memorandum, the employing establishment summarized surveillance videos obtained from July 3 to August 21, 2013. Appellant was observed using a weed eater to trim grass on July 8, 2013, operating a riding mower on July 10, 2013, using a pressure washer on July 18, 2013, using a push mower and riding mower on July 31, 2013, and using a push mower on August 21, 2013. He also lifted containers of grass clippings. The employing establishment asserted that the activities observed on the surveillance videos established that appellant could perform the offered equipment cleaner job.

On December 16, 2013 OWCP requested that Dr. Moore review a revised statement of accepted facts, which summarized the surveillance video memorandum. It requested that he opine whether this new evidence changed his opinion regarding appellant's work limitations. Dr. Moore submitted a December 23, 2013 report opining that appellant could perform full-time sedentary work, with pushing, pulling, and lifting limited to 20 pounds, with walking and standing limited to three hours a day. Appellant was also to avoid "strenuous use of his hands."

In February 2014 the vocational rehabilitation counselor performed a labor market survey. He identified several cashier and sales clerk positions within appellant's physical restrictions. Appellant refused to sign the placement plan and "stated he would not participate."

On March 19, 2014 the employing establishment again offered appellant the equipment cleaner position. It noted that the position was modified to accommodate his specific limitations "of walking and standing no more than three hours a day," no bending or stooping and pushing

and pulling up to nine pounds. Appellant submitted his April 3, 2014 statement refusing the offered position. He asserted that he could not work due to macular degeneration in both eyes, status post bilateral total knee arthroplasties, a blocked artery behind his right knee, a myocardial infarction following knee surgery in 2009, a quadruple bypass following the heart attack, and weakness and clumsiness of both hands.

In an April 17, 2014 letter, Dr. Bates opined that appellant's severe bilateral wrist arthroses and status post knee arthroplasties rendered him permanently disabled for work. In an April 22, 2014 report, he recommended an exercise program. Dr. Bates proscribed heavy lifting, noting that appellant was medically unable to return to work as a mechanic. He noted that appellant continued to have difficulties with bilateral hand and wrist pain, weakness, and numbness, and that appellant wore a thumb spica splint on the left hand.

In a June 9, 2014 letter, OWCP requested that Dr. Bates provide a supplemental opinion based on the updated statement of accepted facts summarizing the surveillance video. It provided a copy of the letter and the revised statement of accepted facts to appellant. Dr. Bates responded by June 18, 2014 letter, finding that based on the revised statement of accepted facts, appellant was fit to perform the offered equipment cleaner position.

By letter dated June 27, 2014, OWCP advised appellant that the offered position was suitable work as approved by Dr. Bates and within the limitations provided by Dr. Moore. It further advised appellant of the penalty provision under section 8106(c) of FECA for refusing suitable work. OWCP afforded him 30 days to either accept the offered position or provide valid reasons for his refusal.

Appellant responded by July 21, 2014 letter, contending that he could not perform the equipment cleaner position due to advanced arthritis in both thumbs, status post bilateral knee replacement, an inability to walk on slippery or uneven surfaces, stoop or kneel, a blocked right popliteal artery, macular degeneration in the right eye, and cardiovascular problems. He requested a copy of the surveillance video as described in the statement of accepted facts OWCP provided to him.

In an August 20, 2014 letter, OWCP noted that appellant had requested a copy of the surveillance video. It enclosed and mailed a copy of the surveillance video DVD that had been provided to Dr. Moore.

In a September 4, 2014 letter, OWCP advised appellant that it had considered his reasons for refusal and found them unacceptable. It noted that he submitted no rationalized medical evidence establishing that he was medically unable to perform the equipment cleaner position. OWCP afforded him 15 days in which to accept the position or his wage-loss compensation benefits would be terminated. It noted that no further reasons for refusal would be considered. Appellant did not submit additional evidence or argument prior to September 23, 2014.

By decision dated September 23, 2014, OWCP terminated appellant's wage-loss compensation benefits and schedule award entitlement effective that day under 5 U.S.C. § 8106(c) as he had refused the offer of suitable work. It found that the offered equipment

cleaner position conformed to Dr. Bates' restrictions demonstrating that appellant could perform full-time modified duty.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits. It has authority under section 8106(c)(2) of FECA to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered: To justify termination, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of his refusal to accept such employment and that he was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position is not suitable.⁴ In this case, it terminated appellant's compensation under section 8106(c)(2) of FECA, which provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.⁵

OWCP regulations provide factors to be considered in determining what constitutes "suitable work" for a particular disabled employee, include the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work, and other relevant factors.⁶ The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.

Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.⁷ Section 10.517(a) of FECA's implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured, has the burden of showing that such refusal or failure to work was reasonable or justified.⁸ Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.⁹

⁴ See *Ronald M. Jones*, 52 ECAB 190, 191 (2000); see also *Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon.*, 43 ECAB 818, 824 (1992). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 2013) (the claims examiner must make a finding of suitability, advise the claimant that the job is suitable and that refusal of it may result in application of the penalty provision of 5 U.S.C. § 8106(c)(2) and allow the claimant 30 days to submit his or her reasons for abandoning the job. If the claimant submits evidence and/or reasons for abandoning the job, the claims examiner must carefully evaluate the claimant's response and determine whether the claimant's reasons for doing so are valid).

⁵ 5 U.S.C. § 8106(c)(2); see also *Geraldine Foster*, 54 ECAB 435 (2003).

⁶ *Rebecca L. Eckert*, 54 ECAB 183 (2002).

⁷ *Joan F. Burke*, 54 ECAB 406 (2003); see *Robert Dickerson*, 46 ECAB 1002 (1995).

⁸ 20 C.F.R. § 10.517(a); *Ronald M. Jones*, 52 ECAB 190 (2000).

⁹ *Id.* at § 10.516.

ANALYSIS

OWCP accepted that appellant sustained bilateral thumb osteoarthritis, bilateral wrist osteoarthritis, bilateral knee osteoarthritis, and bilateral knee joint replacement. As noted in the Board's prior decision and order, appellant stopped work on June 30, 1998 and did not return.

Dr. Moore, a Board-certified orthopedic surgeon and second opinion physician, opined in June 6 and December 23, 2013 reports that appellant could perform full-time sedentary work. He noted permanent work restrictions limiting lifting, pulling, and pushing to 20 pounds for no more than three hours a day, walking and standing to three hours a day, no bending or stooping, and no strenuous use of the hands. Dr. Moore based his opinion, in part, on a statement of accepted facts summarizing employing establishment surveillance recordings showing appellant mowing his lawn, carrying bags of grass clippings, and using a weed eater.

The employing establishment utilized Dr. Moore's work limitations in formulating a modified equipment cleaner position, first offered to appellant on November 5, 2013. The job duties involved handling aircraft components familiar to appellant from his years of work as an aircraft mechanic at the employing establishment. The offered position did not require bending or stooping, the use of hand or power tools, or working in areas with wet floors. Appellant would be required to walk and stand up to three hours a day, and pull and push up to nine pounds.

Dr. Bates, an attending Board-certified orthopedic surgeon, initially found appellant totally disabled for work. However, after reviewing the updated statement of accepted facts describing appellant's activities in the surveillance video, he approved the position on June 18, 2014.

Appellant declined the position asserting that he remained totally disabled for work due to occupational and nonoccupational conditions. On September 4, 2014 OWCP afforded him 15 days to accept the position or his wage-loss compensation benefits would be terminated. Appellant did not submit additional evidence or argument. OWCP terminated his wage-loss compensation and schedule award eligibility effective September 23, 2014, finding that he had refused an offer of suitable work.

The Board finds that the offered modified equipment cleaner position was medically and vocationally suitable. Dr. Bates approved the job, which also conformed to the work limitations provided by Dr. Moore. The duties listed involved equipment and components with which appellant had substantial work experience. OWCP thus complied with the procedural requirements of section 8106(c) of FECA. It met its burden of proof to terminate appellant's compensation benefits based on his refusal to accept suitable work.¹⁰

On appeal, appellant contends that OWCP colluded with the employing establishment to obtain surveillance videos of his activities to pressure Dr. Moore into rescinding his work

¹⁰ *K.P.*, Docket No. 14-2019 (issued June 4, 2015); *A.B.*, Docket No. 14-1176 (issued October 27, 2014); *Roy E. Bankston*, 38 ECAB 380 (1987).

restrictions. As the Board noted in *F.S.*,¹¹ and in *P.S.*,¹² the investigative practices of an employing establishment's inspection service, including obtaining surveillance videos, are not within the jurisdiction of the Board.¹³ However, the Board has noted that although video footage may be of some value to a physician asked to render a medical opinion, it may also be misleading if material facts are omitted. Thus, OWCP is obliged to notify the claimant when such footage is given to a physician and, upon request, provide a copy of the recording and a reasonable opportunity to respond to its accuracy.¹⁴

OWCP notified appellant of the surveillance video on June 9, 2014, and that it had provided the video to physicians in the case. The Board finds that the June 9, 2014 letter fulfilled OWCP's obligation to notify him of the surveillance footage and of its provision to physicians in the case. The Board further finds that OWCP met its obligation to provide appellant with a copy of the video in response to his July 21, 2014 request. OWCP mailed him a DVD of the surveillance video on August 20, 2014. Appellant thus had a reasonable opportunity to respond to its accuracy prior to the September 23, 2014 termination decision.¹⁵

Appellant also asserts that the duties of the offered equipment cleaner position exceeded his medical restrictions. As stated above, the position was within the limitations provided by Dr. Moore. Also, Dr. Bates approved the job offer on June 18, 2014. In addition, appellant argues that the offered position was not suitable work as it was formulated to accommodate his specific work limitations. The Board notes that appellant's contentions in this regard confuse the factors relevant to determining suitable work under section 8106(c) with the criteria pertinent to loss of wage-earning capacity determinations. There is no loss of wage-earning capacity issued on the present appeal.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation effective September 23, 2014 because he refused an offer of suitable work.

¹¹ Docket No. 11-863 (issued September 26, 2012).

¹² Docket No. 13-1018 (issued June 19, 2014).

¹³ *Supra* note 11; *id.*

¹⁴ *A.P.*, Docket No. 13-30 (issued March 18, 2013). *Supra* note 11. *See also Frederick Nightingale*, 6 ECAB 268 (1953) ("appellant should have been apprised of the conflicts and inconsistencies, and of the general nature of the adverse evidence developed, in order that he might know the nature of the issues to be met and have an opportunity to present such rebuttal or explanation as was available. This is ... vital in the nonadversarial proceedings under FECA, as it is the function of the Bureau [OWCP's predecessor agency] to adjudicate the rights of claimants in the light of all the relevant facts, facts which can only be developed fully when the claimant is fairly advised as to the nature of evidence from other source which bears on his claim").

¹⁵ *A.P.*, *id.*; *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 23, 2014 is affirmed.

Issued: August 10, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board